Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

80-138

No. .....

In The

Supreme Court of the United States

October Term, 1980

—o—

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF IOWA

—o—

MOTION TO DISMISS APPELLANT'S APPEAL

—o—

MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

—o—

ELGIN, HOYMAN & CLOGG
106 East Salem Avenue
Indianola, Iowa 50125
Telephone: (515) 961-2574
BY: P. F. ELGIN
Counsel for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Motion to Dismiss Appellant's Appeal and Motion to Affirm Decision of Iowa Court of Appeals 1

Argument:

I. Appellant has not challenged the validity of a state statute to warrant a direct appeal from a state court decision. 2

II. Appellant did not properly raise the issue of whether the ward was given notice in conformity with due process so as to present a justiciable case or controversy. 5

III. The notice procedure prescribed by the Court in the Della Vanderlinden Conservatorship proceeding did not violate due process of law. 7

IV. The decision of the Iowa Court of Appeals was decided on the basis of collateral attack, a non-federal issue. 11

V. In the event the Court finds that the Appellant's direct appeal is improper, and deems the appeal to be a petition for writ of certiorari, Appellee submits that certiorari should be denied. 13

Conclusion 14

CITATIONS

CASES:

Aetna Life Ins. Co. v. Haworth, 30 U. S. 227 (1937) 6

CITATIONS—Continued

Pages

Anderson v. Schwitzer, 236 Iowa 765, 20 N. W. 2d 67 (1945) 11

Castillo v. McConnico, 168 U. S. 674 (1897) 6

Covey v. Town of Sommers, 351 U. S. 141 (1956) 10

Eves v. Iowa Employment Security Commission, 211 N. W. 2d 324 (Iowa 1973) 9

Flanders v. Waterloo Community School District, 217 N. W. 2d 579 (Iowa 1974) 4, 5, 10

Gigilos v. Stavropoulos, 204 N. W. 2d 619 (Iowa 1973) 11

Hanson v. Denkla, 357 U. S. 235 (1958) 3

In Re Estate of Staab, 192 N. W. 2d 804 (Iowa 1971) 8

Kulko v. Super. Ct. of California, 436 U. S. 84 (1978) 3, 4

Lewis v. Farmers' Grain Co. of Cambridge, 214 Iowa 143, 241 N. W. 469 (1932) 6

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 8, 11

Roshek Realty Company v. Roshek Brothers Company, 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957) 9

Stake v. Cole, 257 Iowa 594, 133 N. W. 2d 714 (1965) 11

Vlandis v. Kline, 412 U. S. 441 (1973) 10

CITATIONS—Continued

Pages

CONSTITUTIONS:

U. S. CONST. Art. III, Section 2 6

STATUTES:

Iowa Code Section 633.40 (1971) 3, 4, 8

Iowa Code Section 633.40 (1973) 13

Iowa Code Section 633.389 (1971) 3, 4

28 U. S. C. Section 1257 (c) 2, 5, 12

RULES:

Rule 17, U. S. Rules of Supreme Court 13

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1980

—o—

DEAN VANDERLINDEN, EXECUTOR OF THE ESTATE OF W. F. VANDERLINDEN, DECEASED,

Appellant,

vs.

RICHARD VANDERLINDEN AND RICHARD VANDERLINDEN, EXECUTOR OF THE ESTATE OF AGATHA VANDERLINDEN, DECEASED,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF IOWA

—o—

MOTION TO DISMISS APPELLANT'S APPEAL

—o—

MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

—o—

MOTION TO DISMISS APPELLANT'S APPEAL AND MOTION TO AFFIRM DECISION OF IOWA COURT OF APPEALS

COMES NOW Appellee, Richard Vanderlinden and Richard Vanderlinden, Executor of the Estate of Agatha Vanderlinden, Deceased, and moves the Court to dismiss Appellant's Direct Appeal to the United States Supreme

Court or, in the alternative, to affirm the decision of the Iowa Court of Appeals, dated February 26, 1980, for the following reasons and grounds:

I. Appellant has not challenged the validity of an Iowa statute to warrant a direct appeal and the validity of an Iowa statute was not expressly passed on by the Iowa Court of Appeals.

II. Appellant has failed to raise a substantial federal question in that Appellant did not properly raise the issue of whether the ward was given notice in conformity with due process so as to present a justiciable case or controversy.

III. The notice procedure prescribed by the Court in the Della Vanderlinden Conservatorship proceeding did not violate due process of law.

IV. The decision of the Iowa Court of Appeals was decided on the basis of collateral attack, a non-federal basis.

———o———

ARGUMENT

I.

Appellant has not challenged the validity of a state statute to warrant a direct appeal from a state court decision.

28 U. S. C. Section 1257 (2) provides for a direct appeal, inter alia, where the validity of a state statute is drawn in question as being repugnant to the Constitution,

treaties, the laws of the United States, and the decision was in favor of its validity.

Appellant has not challenged the validity of any state statute. Appellant has only raised the issue of whether the notice given to the ward violated due process of law. Hence, there was no challenge to a particular statute.

In *Kulko v. Super. Ct. of California,* 436 U. S. 84, 90 (1978), the U. S. Supreme Court held that the case before them was improperly brought as an appeal since no state statute was drawn in question as being repugnant to the Constitution.

> Appellant did not argue below that this statute was unconstitutional but instead argues that the due process clause of the XIV Amendment precluded the exercise of in personam jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather the question decided was whether the Constitution itself would permit the assertion of jurisdiction. *Hanson v. Denkla,* 357 U. S. 235, 248 (1958).

The same reasoning is applicable to the case at bar. Appellant did not contend that *Iowa Code* Section 633.40 or 633.389 (1971) was unconstitutional on its face or as applied to the facts. In fact, the notice issue was not raised in Appellant's original Petition for Declaratory Judgment nor in his amended Petition. The first reference to the notice issue was contained in Appellant's Motion for Summary Judgment. However, the reference was not to the constitutional validity of the notice statute, but only to the propriety of the manner and time of the notice.

Nor did the Iowa Court of Appeals pass on the validity of these statutes. The Iowa Court, as in *Hanson v. Denkla,*

supra, and *Kulko v. Super. Ct. of California,* supra, addressed and resolved only the issue of whether the notice prescribed was in accordance with due process.

Appellant's purported attack on the construction of *Iowa Code* Section 633.40 and Section 633.389 (1971) is based on an erroneous construction of the Iowa Court of Appeals' opinion. Appellant contends that the Court of Appeals construed the meaning of the word "notice" to permit an oral communication. Appellant's Jurisdictional Statement at 16. Such a construction is without support or foundation. Written notice was given in the case at bar and is the judicially accepted practice in this state. The question of whether an oral notice would have been proper is irrelevant since it is undisputed that the notice was, in fact, in writing.

Appellant's reference to selected sentences in one paragraph of the Court of Appeals' opinion was taken out of context. Appellant's Jurisdictional Statement at 16. A reading of the entire paragraph shows that the Court of Appeals was not altering the basic concept that notice must be a written communication. Opinion, Court of Appeals, App. p. 6. But rather the Court was saying that under *Iowa Code* Section 633.40 (1971), the written communication need not be the formalized writing required in *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (Iowa 1974), for notice in an Administrative proceeding.

Furthermore, *Flanders,* supra, did not involve an interpretation of a judicial Order. In fact, the Court in *Flanders,* 217 N. W. 2d at 581, specifically prefaced its opinion by saying:

> At the outset we note that the steps to be taken by the board are at statutorily mandated dates and times. Those dates and times must, therefore, be observed; we cannot judicially supercede them by times which we might deem "reasonable." 217 N. W. 2d at 581.

Thus the Court in *Flanders,* supra, virtually limited the applicability of its opinion to cases interpreting the administrative statute involved.

The Court of Appeals, in the case at bar, was not referring to the deletion of a written notice; but rather the Court was referring to the deletion of the formalized rules set forth in *Flanders,* supra. This interpretation of the Court of Appeals' opinion is entirely consistent with prior judicial opinions and with the established practice for notice in the courts of Iowa.

The construction of the statute has not been challenged. Appellant's only basis for attack on the statute is a distorted construction of the Iowa Court of Appeals' opinion in order to make it appear that the statute was called into question.

Consequently, the U. S. Supreme Court lacks appellate jurisdiction. Appellee urges the Court to dismiss the appeal under 28 U. S. C. Section 1257 (c) (2).

II.

Appellant did not properly raise the issue of whether the ward was given notice in conformity with due process so as to present a justiciable case or controversy.

The Courts of the United States are Courts of limited jurisdiction. One of the limitations placed on the Courts

by the Constitution restricts the judicial process to "cases or controversies." U. S. Const. Art. III, Section 2.

Appellant did not allege, nor did he present any evidence, that the ward did not actually receive the notice. Hence, it must be assumed that the ward did, in fact, receive the notice. The case must be decided upon the pleadings as they are, and not upon averments which might have been, but were not, included therein. *Lewis v. Farmers' Grain Co. of Cambridge,* 214 Iowa 143, 241 N. W. 469, 471 (1932).

In essence, Appellant is asking the Court whether there would have been a violation of due process if the ward had not received the notice. Such a request does not present a justiciable case or controversy.

"A justiciable controversy is thus distinguishable from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief for a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth,* 30 U. S. 227, 239-240 (1937).

> The (Appellant) has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether the effect of applying the statute is to deprive him of his property without due process of law. Castillo v. McConnico, 168 U. S. 674, 680 (1897).

The Courts would be unduly burdened with unnecessary litigation if a party could come into Court with a

hypothetical issue. Such a practice would defeat the very basis of the "case or controversy" concept.

Appellant has not presented a proper set of facts to raise a constitutional violation. Without an allegation or some evidence that the ward did not receive the notice, the Court is without jurisdiction absent a case or controversy.

III.

The notice procedure prescribed by the Court in the Della Vanderlinden conservatorship proceeding did not violate due process of law.

Appellant contends that the notice procedure presented by the Court in the Della Vanderlinden Conservatorship proceeding violated due process in three respects. The first alleged violation is the propriety of the Court's prescription of notice by ordinary mail. The second alleged violation is the constitutional validity of the Affidavit of Mailing as proof of receipt of the Notice. The third alleged violation is the presumption created by the Affidavit of Mailing.

Addressing the first contention, Appellee submits that the notice given to the ward pursuant to the Court Order prescribing notice by ordinary mail did not violate due process. The notice complied with the Iowa Probate Statute in effect in 1971 relating to notice:

Notice in Probate Proceedings

(1) Court prescribing notice. Except as otherwise provided in this Code, the Court shall fix the time and place of hearing on any matter requiring notice and shall prescribe the time and manner of service of the

notice of such hearing. *Iowa Code* Section 633.40 (1971).

The Court in the Conservatorship proceeding specifically found that notice was given as prescribed by Court Order. Appellant argues that the procedure of mailing notice was not sanctioned until 1972 when it was statutorily approved. However, prior to this time, the practice of mailing notice was both common and accepted. *In Re Estate of Staab,* 192 N. W. 2d 804 (Iowa 1971). Hence the 1972 amendment to the notice section of the Iowa Probate Code merely codified the judicially accepted practice of prescribing notice by ordinary mail.

Appellant contends that the notice by ordinary mail did not meet the test of due process presented in *Mullane v. Central Hanover Bank & Trust Company,* 339 U. S. 306 (1950). However, *Mullane,* supra, required, not the best possible notice, but that the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U. S. 306, 314 (1950).

The "circumstances" in the case at bar include the fact that the ward had, on several occasions, discussed the sale with her husband, the Conservator, and her son, the purchaser. She opened a voluntary conservatorship nominating her husband as Conservator. Although the sale proceeding was technically adversary in nature, the underlying facts reveal that the ward had full knowledge of the sale and was in agreement with the sale.

In order to insure greater protection for the ward, the Court appointed a Guardian ad Litem to represent her

best interests. The Guardian ad Litem was also served with notice of the sale proceedings.

Furthermore, in her Will, the ward left her property to her husband and named him Executor of her Estate. Appellant apparently interpreted the ward's lack of objection to the sale as evidence that she failed to receive the notice. The contrary is clearly the case. The ward was in full agreement with the sale and saw no need to take action upon receipt of the notice. Under all these circumstances, the Court of Appeals correctly held that the notice prescribed by the Court was reasonably calculated to apprise her of the sale and to give her an opportunity to be heard.

Appellant's second and third contentions actually involve a single issue. Appellant contends that the Affidavit of Mailing failed to comply with due process; he further contends that the presumption created by the Affidavit of Mailing violated due process.

The requisite Affidavit of Mailing was filed in the Conservatorship proceeding showing that the notice was sent to the ward by ordinary mail. The Affidavit created a presumption that the notice was received. *Roshek Realty Company v. Roshek Brothers Company,* 249 Iowa 349, 356, 87 N. W. 2d 8, 13 (1957); *Eves v. Iowa Employment Security Commission,* 211 N. W. 2d 324, 327 (Iowa 1973). This presumption could have been rebutted by evidence to the contrary, i. e., that the notice was not received. Appellant did not allege, nor did he present any evidence, that the ward did not receive the notice.

Furthermore, the presumption of actual receipt of notice is not a violation of due process. The presumption

is rebuttable and, therefore, distinguishable from the conclusive presumption held invalid in *Vlandis v. Kline,* 412 U. S. 441 (1973), cited by Appellant. A rebuttable presumption merely imposes the burden on the party contesting the notice to present some evidence of non-receipt of the notice. Appellant failed to rebut the presumption in that he failed to allege or present evidence of non-receipt.

Appellant's reliance on *Flanders v. Waterloo Community School District,* 217 N. W. 2d 579 (1974), is misfounded. In *Flanders,* supra, the Court required proof of receipt of the notice because it was undisputed that notice was not actually received in accordance with the statute, i. e., the presumption was rebutted. Conversely, in the case at bar, Appellant did not rebut the presumption of actual receipt of the notice. Furthermore, the notice in *Flanders,* supra, was not held to be in violation of due process. The Court specifically stated that it was not deciding whether the notice procedure was "reasonable," but only whether it complied with the specific statutory requirement for notice in a school contract action. 217 N. W. 2d at 581.

Nor is Appellant justified in relying on *Covey v. Town of Sommers,* 351 U. S. 141 (1956). In *Covey,* supra, the Court found that notice to the ward by ordinary mail was a violation of due process because the ward was incompetent and did not have a Guardian appointed to represent her interests. The case is clearly distinguishable from the case at bar. It is undisputed that Della Vanderlinden was mentally competent at all stages of the proceeding. Furthermore, a Guardian ad Litem was appointed to protect her interests and was served with notice of the sale proceeding.

The notice prescribed was in accordance with the Iowa Probate Code, Iowa case law, and with the due process clause. Under all of the circumstances, the procedure used in prescribing notice met the *Mullane* standards of being "reasonably calculated", under all the circumstances, to apprise the ward of the pending sale.

IV.

The decision of the Iowa Court of Appeals was decided on the basis of collateral attack, a non-federal issue.

Appellant's Petition for Declaratory Judgment in the Estate Proceeding of Della Vanderlinden was a collateral attack on the judgment of the Court in the prior Conservatorship proceeding of Della Vanderlinden. The Order of the Court in the Conservatorship proceeding authorizing the sale of the ward's property had the force and effect of a judgment or final adjudication. *Stake v. Cole,* 257 Iowa, 594, 133 N. W. 2d 714, 718 (1965). A judgment or final adjudication is not subject to collateral attack unless the Court was without jurisdiction. *Anderson v. Schwitzer,* 236 Iowa 765, 20 N. W. 2d 67, 71 (1945).

Furthermore, a collateral attack cannot be predicated on ". . . matters or issues which actually were, or which, with due diligence, could have been, presented or adjudicated in the original proceeding." *Gigilos v. Stavropoulos,* 204 N. W. 2d 619, 621 (Iowa 1973).

The Court in the Conservatorship proceeding prescribed notice by ordinary mail to the ward at her mailing address in Milo, Iowa at least five days prior to the hear-

ing. The Affidavit of Mailing established a presumption of mailing ten days prior to the hearing date. At the hearing, the Court found that notice had been given in accordance with the prior Court Order. Thus the issue of proper notice to the ward was clearly addressed and adjudicated by the Court and held to have been proper.

Appellant contends that the Court was without jurisdiction on the grounds that the ward may not have received notice of the sale of her property and thus was denied due process of law under the XIV Amendment. Absent an allegation or some evidence that the ward did not receive the notice, Appellant is precluded from raising a hypothetical question.

Furthermore, the notice prescribed by the Court in the Della Vanderlinden Conservatorship proceeding was reasonably calculated to apprise her of the sale proceeding and gave her an opportunity to be heard.

Absent a violation of due process, the Probate Court had personal jurisdiction over the ward to enter an order authorizing the sale. Therefore, the attack by the Appellant in the subsequent estate proceeding was clearly a collateral attack.

The Iowa Court of Appeals, having found that notice was proper and that the Probate Court had jurisdiction, correctly held that Appellant's attempt to impeach the judgment was a collateral attack.

The impermissability of collateral attack is a state procedural question without federal implication. The lack of a federal question precludes the Court from taking jurisdiction under 28 U. S. C. 1257 (c).

V.

In the event the Court finds that the Appellant's direct appeal is improper, and deems the appeal to be a petition for writ of certiorari, Appellee submits that certiorari should be denied.

Rule 17 of the Supreme Court Rules pertaining to Writs of Certiorari provides that such a Writ is not a matter of right but of judicial discretion. Furthermore, a Writ of Certiorari is only granted where there is a federal question which is special and important. As discussed in Argument IV, Appellee submits that Appellant has failed to raise a federal question and, therefore, certiorari should be denied for the same reasons that a direct appeal should be denied.

Appellee further submits that there is no federal question to address since the decision below was based on collateral attack, a non-federal question.

In addition, any decision handed down in this matter would have very limited applicability since the Iowa Probate Code regarding notice has been amended since the facts occurred underlying this case. Notice by ordinary mail, judicially sanctioned at the time of this case, has now been statutorily sanctioned. *Iowa Code* Section 633.40 (1973).

Furthermore, the question of whether the ward actually received the notice is a factual question resolved against Appellant in the lower courts.

Hence, not only does Appellant's appeal fail to generate a true federal question, but the appeal is without special merit and significant import.

CONCLUSION

For the reasons set forth herein, Appellee respectfully requests that Appellant's appeal be dismissed, or in the alternative, that the decision of the Iowa Court of Appeals, dated February 26, 1980 be affirmed.

Respectfully submitted,

ELGIN, HOYMAN & CLOGG

106 East Salem Avenue
Indianola, Iowa 50125
Telephone: (515) 961-2574

By: /s/ P. F. ELGIN

Counsel for Appellee